IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

QAP, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, CENTRAL REGION CONSTRUCTION,	)	
	)	
Appellee.	)	
	)	Case No.: 3AN-21-07080 CI

DECISION ON APPEAL

I. INTRODUCTION

In 2017 appellee, Department of Transportation and Public Facilities, Central Region Construction ("DOT"), contracted with appellant, QAP, Inc. ("QAP"), for a project involving the resurfacing of the Dillingham airport runway. Three contract disputes developed, which led QAP to make three claims. Two involved the foreseeable amount of the oil needed for the base course and runway. The third claim involved a price adjustment. The Contracting Officer for DOT rejected all three claims and an administrative hearing eventually followed. In 2021, the Administrative Law Judge ("ALJ") issued a decision denying all three claims and the Commissioner of DOT subsequently adopted it.[1] Pursuant to Alaska Appellate Rule 602(c)(1)(A), QAP now appeals the decision pertaining to the third claim. Oral argument took place on October 17, 2022. Having considered the entirety of the record, the briefs and arguments of the parties, the court hereby AFFIRMS the ALJ's decision, as adopted by the Commissioner, for the reasons that follow.

[1] *QAP, Inc.*, OAH No. 19-0961-CON (2021), *adopted* by Comm'r.

II. BACKGROUND AND SUMMARY OF FACTS

The background of the contract specifications generally and the specification known as Specification P-401, including its various components, are necessary to understanding QAP's claim on appeal.

DOT has three construction regions within the State of Alaska: Northern Region, Central Region, and Southcoast Region.[2] For each construction project contract, a set of standard specifications apply.[3] In addition, a project contract may include special provisions which are incorporated into the project's standard specifications.[4] Prior to a project contract being advertised and opened for bidding, the project specifications are reviewed at "milestone meetings."[5] All specifications must comply with state laws and local ordinances. If a project is federally funded, these specifications must also not conflict with federal guidelines for airport construction established by the Federal Aviation

---

[2] Admin. Hr'g Tr. of Record, Laura Paul Test. on Day 2 at 327. The project at the center of this dispute was within the Central Region.

[3] A project contract will include "the Invitation to Bid, Bid Form, Standard Specifications, Special Provisions, Plans, Bid Schedule, Contract Forms, Contract Bonds, Addenda, and any Change Orders, Interim Work Authorizations, Directives, or Supplemental Agreements that are required to complete the work in an acceptable manner, all of which constitute one instrument," R. at 873.

[4] An example of special provisions is when the Statewide Materials Section develops specifications unique to a particular region.

Special provisions are defined in the project contract as an "[a]ddition or revision that amends or supersedes the Standard Specifications and is applicable to an individual project," R. at 856.

Special provisions are identified in the specifications as changes to the text as follows: strikethrough = deleted language; underlined = additions; and a vertical bar in the margin = location of a special provision, R. 850.

Throughout this decision, the term "specifications" will apply to both the standard specifications and special provisions.

[5] Admin. Hr'g Tr. of Record, Mike Yerkes Test. on Day 2 at 299 (Mr. Yerkes testified that during project development, the plans, specifications, and estimates, "PS&E," are reviewed at 65% and 95% completion).

Administration ("FAA").[6] The federal guidelines are outlined in FAA advisory circulars.[7] When changes to federal guidelines occur, an advisory circular is issued for guidance.

Around 2016, DOT enlisted a steering committee to update its specifications in accordance with FAA Advisory Circular 10G ("AC 10G").[8] AC 10G included changes to Specification P-401 ("P-401").[9] In general, P-401 is applicable to flexible pavement design, meaning only the asphalt.[10] In particular, P-401 outlines the requirements mandated for asphalt regarding the materials, composition, construction methods, contractor quality control, method of measurement, and basis of payment.

While the steering committee updates were occurring, DOT was also in the process of making substantial changes to a portion of P-401's testing methods that corresponded to price adjustments.[11] P-401 testing methods assess the density of the pavement, the quality of the asphalt oil for achieving the desired stiffness and creep recovery, and the quality of the joints between paving courses.[12] The results of the testing determine the outcome of four price adjustments within P-401.[13] Respectively, the first adjustment is known as the Hot Mix Asphalt ("HMA") price adjustment; the second as the Asphalt Cement Property ("ACP") price adjustment, the third as the Longitudinal Joint price adjustment, and the

---

[6] Paul Test. at 328, 330.

[7] *Id.* at 328. The advisory circulars appear to act as informational guides to others in the industry as well as the general public.

[8] *Id.* at 330, 351. The steering committee was approximately five representatives from each of the State's regions, *id.* at 327. Laura Paul was one of these representatives for the Central Region, *id.*

[9] *Id.* at 327.

[10] *Id.* at 328 (Ms. Paul testified that the asphalt as a whole is also referred to as hot mix asphalt).

[11] *Id.* at 341-342 (Ms. Paul testified that DOT's materials engineer introduced the new testing method and it was implemented by the end of 2016 into both highway and airport construction projects for the first time); *see also* R. at 334-340.

[12] R. at 1006. The terms "asphalt oil," "asphalt cement," and "asphalt binder" are used interchangeably, *see* Paul Test. at 331. However, for this decision we are using the term "asphalt oil."

[13] R. at 127-132.

fourth as the Asphalt Material price adjustment.[14] DOT's changes pertained to the testing methods for the ACP price adjustment under Subsection 401-8.2 of P-401.

Prior to the testing methods change, DOT had been measuring the asphalt oil using the Toughness and Tenacity test ("T & T").[15] The T&T test was used as a basis for making downward price adjustments in payments for asphalt oil that was below required standards but still acceptable.[16] The price adjustments ranged from no reduction up to a 25% reduction.[17] In practice, after testing was complete, the project engineer would check the results of the T & T test against the Asphalt Cement Property Pay Reduction Factors table ("Table 9") in Subsection 401-8.2.a.[18] The table would provide a pay reduction factor (PRF) to be used in the adjustment calculation.[19] Table 9 provided:

[14] *Id.* The price adjustments, in the order stated above, are outlined in the contract's Subsections 401-8.1.a., 401-8.2.a., 401-8.3.a., 401-8.4 of Specification P-401. The HMA price adjustment will be discussed in footnotes 36 and 44 of this decision. The ACP price adjustment is the center of the present dispute. The Longitudinal Joint price adjustment is not disputed. The Asphalt Material price adjustment is irrelevant for purposes of this decision.

[15] DOT first incorporated the T & T test into airport construction specifications as a special provision to P-401 following the introduction of polymers around 2011, Paul Test. at 333; R. at 334-340. The purpose of this special provision was that the existing standard specifications at the time resulted in either a pass or fail, it did not address price deductions for non-compliant asphalt oil or provide leeway for asphalt oil that was slightly outside of the specifications without it being entirely rejected, Paul Test. at 336; R. at 334-340.

[16] Paul Test. at 337-338; R. at 334-340. In other words, DOT could now accept sub-par asphalt oil until a certain point, but the contractor would be penalized.

[17] R. at 334-340. See the highlighted PRFs in figure 1 above. The potential price deductions ranging from 0 to 25% are represented as decimal fractions (0, 0.04, 0.05, etc.).

[18] Paul Test. at 334-336.

[19] *Id.*

Figure 1 – Table 9

TABLE 9. ASPHALT CEMENT PROPERTY PAY REDUCTION FACTORS
(Use the single, highest pay reduction factor)

	Spec	Pay Reduction Factor (PRF)								
		0	0.04	0.05	0.06	0.07	0.08	0.10	0.25	Reject or Engr Eval
Tests On Original Binder										
Viscosity	≤3 Pa-s	≤3		>3						
Dynamic Shear	≥1.00 kPa	≥1.00		0.88-0.99				0.71-0.87	0.50-0.70	<0.50
Tough-ness	≥110 in-lbs	≥93.5	90.0-93.4	85.0-89.9	80.0-84.9	75.0-79.9	70.0-74.9			<70.0
Tenacity	≥75 in-lbs	≥63.8	61.0-63.7	58.0-60.9	55.0-57.9	52.0-54.9	48.0-51.9			<48.0
Tests On RTFO										
Mass Loss	≤1.00 %	≤1.00		1.001-1.092				1.093-1.184	1.185-1.276	>1.276
Dynamic Shear	≥2.20 kPa	≥2.20		1.816-2.199				1.432-1.815	1.048-1.431	<1.049
Test On PAV										
Dynamic Shear	≤5000 kPa	≤5000		5001-5289				5290-5578	5579-5867	>5867
Creep Stiffness, S	≤300 Mpa	≤300		301-338				339-388	389-450	>450
Creep Stiffness, m-value	≥0.300	≥0.300		0.287-0.299				0.274-0.286	0.261-0.273	<0.261
Direct Tension	≥1.0 %	≥1.0		0.80-0.99				0.71-0.85	0.56-0.70	<0.56

The highest PRF for all lots would then be inserted into Table 9's corresponding formula to determine whether there would be a pay reduction. If the asphalt oil optimally met the project specification, the "penalty" would be $0.[20] Table 9 formula provided as follows:

Figure 2 - Table 9 Formula

Asphalt Cement Property Price Adjustment for each lot = 5 x PAB x Qty X PRF (Always a deduct)

It later became apparent that the T & T test was no longer generating accurate results.[21] To correct this failing, DOT adopted a new testing method, the Mass Stress Creep Recovery ("MSCR") test.[22] When DOT shifted to the MSCR test, it adopted a new table

[20] *Id.* at 335. Note this does not mean the contractor is not paid for the asphalt. The P-401 price adjustments are not applied to the unit prices bid by the contractor for the asphalt and its components. The contractor is being paid at the contract unit price per ton for the asphalt. These price adjustments are instead added or subtracted, according to the specification language, from the overall sum due and included on line-item P-401b of the pay estimate.

[21] *Id.* at 333, 336-341.

[22] *Id.* at 339-341.

to replace Table 9 and a new corresponding formula for the ACP price adjustment. Accordingly, DOT moved to Table 10 shown in figure 4 below, with a new corresponding formula shown in figure 3 below:

Figure 3 – Table 10 Formula

a. Asphalt Cement Property Price Adjustment = Lowest Pay Factor x Quantity x PAB x 5

Select the lowest pay reduction factor from:

RTFO (test the binder residue at the performance grade temperature)
(1) DS, All Grades, G*/Sinδ, kPa
(2) MSCR: PG, Select the highest pay factor corresponding to, either $J_{nr\,3.2}$ or $\%\,Rec_{3.2}$ values

PAV
(3) DS, PG, G*Sinδ, kPa
(4) CS, All Grades, BBR, s MPa
(5) CS, All Grades, BBR, m

b. If three consecutive samples are out of specification, stop HMA production immediately and submit a corrective action plan to the Engineer for approval.

~~Asphalt Cement Property Price Adjustment for each lot = 5 x PAB x Qty X PRF (Always a deduct.)~~

PAB = Price Adjustment Base (See Subsection 401-8.1.a.)
~~Qty = Quantity of asphalt cement represented by lot~~
~~PRF = Pay Reduction Factor from Table 910~~

Figure 4 – Table 10

TABLE 9 10. ASPHALT CEMENT PROPERTY PAY REDUCTION FACTORS
(Use the single, highest pay reduction factor)

			Pay Reduction Factor (PRF)								
		Spec	0	0.04	0.05	0.06	0.07	0.08	0.10	0.25	Reject or Engr Eval
Tests On Original Binder											
Viscosity		≤3 Pa-s	≤3		>3						
Dynamic Shear		≥1.00 kPa	≥1.00		0.88-0.99				0.71-0.87	0.50-0.70	<0.50
Toughness		≥110 in-lbs	≥93.5	90.0-93.4	85.0-89.9	80.0-84.9	75.0-79.9	70.0-74.9			<70.0
Tenacity		≥75 in-lbs	≥93.8	61.0-93.7	58.0-60.9	55.0-57.9	52.0-54.9	48.0-51.9			<48.0
Tests On RTFO											
Mass Loss		≤1.00 %	≤1.00		1.001-1.092				1.093-1.184	1.185-1.276	>1.276
Dynamic Shear		≥2.20 kPa	≥2.20		1.816-2.199				1.432-1.815	1.048-1.431	<1.048
Test On PAV											
Dynamic Shear		≤5000 kPa	≤5000		5001-5280				5280-5678	5679-5857	>5857
Creep Stiffness, S		≤300 Mpa	≤300		301-338				339-388	389-450	>450
Creep Stiffness, m-value		≥0.300	≥0.300		0.287-0.299				0.274-0.286	0.261-0.273	<0.261
Direct Tension		≥1.0 %	≥1.0		0.89-0.99				0.71-0.85	0.53-0.70	<0.53

Pay Factor			1.00	0.95	0.90	0.85	Reject [c]
RTFO (Rolling Thin Film Oven)							
DS[a, 1]	All Grades	G*/Sinδ, kPa	≥ 2.20	2.19 – 1.96	1.95 – 1.43	1.42 – 1.10	< 1.10
MSCR[a, 2]	PG 52-40 "V"	$J_{nr\,3.2}$	≤ 0.50	0.51–0.59	0.60 – 0.69	.70 – 1.00	> 1.00
		$\%\,Rec_{3.2}$	≥ 75	74 – 68	67 – 60	59 – 55	< 55
	PG 58-34 "E"	$J_{nr\,3.2}$	≤ 0.25	0.26 – 0.29	0.30 – 0.39	0.40 – 0.50	> 0.50
		$\%\,Rec_{3.2}$	≥ 85	80 – 84	=	75 – 79	< 75
	PG 64-40 "E"	$J_{nr\,3.2}$	≤ 0.10	0.11 – 0.15	0.16 – 0.20	0.21 – 0.25	> 0.25
		$\%\,Rec_{3.2}$	≥ 95	90 – 94	=	80 – 89	< 80
PAV (Pressurized Aging Vessel)							
DS[a, 3]	PG 52-28, PG 64-40 "E"	G*Sinδ, kPa	< 5000	5001 – 5300	5301 – 5600	5601 – 6000	> 6000
	PG 52-40 "V", PG 58-34 "E"	G*Sinδ, kPa	< 6000	6001 – 6300	6301 – 6600	6601 – 7000	> 7000
CS[a, 4&5]	All Grades[a, 4]	BBR, s, MPa	< 300	301 – 340	340 - 400	401 – 460	> 460
	All Grades[a, 5]	BBR, m	> 0.300	0.299 – 0.294	0.293 – 0.278	0.277 – 0.261	< 0.261

Creep Stiffness (CS) Dynamic Shear (DS) Multiple Stress Creep Recovery (MSCR)

DOT opted to change Table 9 for two primary reasons: 1) DOT wanted the corresponding formula for the ACP price adjustment to be similar to the composite price adjustment formula used in the preceding Subsection 401-8.1.a. covering the HMA price adjustment, and 2) DOT recognized that the FAA prefers price adjustments that offer incentives and penalties over those offering only penalties.[23] DOT planned to change the ACP price adjustment to offer potential incentives within a few months of the switch to the MSCR table.[24] Therefore, DOT wanted a table that it could easily modify for that eventual change without needing to amend the accompanying formula.[25] Consequently, the new table's PRFs ranged from 1.00 to 0.85 (i.e., from 100% to 85%), representing the fraction that would be paid, rather than 0 to 0.25 (i.e., 0 to 25%), representing the amount that would be deducted. The idea was that when small incentives were added and adopted, DOT would modify the table to have a PRF option of 1.01.[26] The additional PRF would allow for a 1% bonus to a contractor and the corresponding formula would not require alteration.[27] However, until the small incentive modification was to occur, Table 10 was intended solely for the purpose of providing a penalty for sub-par asphalt oil.[28]

In March 2017, two significant events occurred. One, DOT became aware that the new formula contained an error.[29] Two, DOT completed the final review of the plans,

---

[23] *Id.*; R. at 334-340. A closer look at the composite price adjustment formula and the new, albeit erroneous, ACP price adjustment formula reflects the similarities DOT was attempting to achieve. The composite price adjustment formula in Subsection 401-8.1.a. provides:
Price Adjustment = [(CPF or DPF) – 1] x (tons in lot) x (PAB).

[24] Paul Test. at 342-344.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* "Sub-par" means the asphalt oil was not optimal but still sufficiently within project specifications to be accepted.

[29] *Id.* at 352-353 (Ms. Paul testified that DOT discovered the error when a supplier of asphalt oil on an unrelated project asked how to interpret it).

specifications, and estimates ("PS&E") for the Dillingham Runway Rehabilitation project.[30] It is unknown which of these two events occurred first.[31]

On May 25, 2017, DOT advertised the Dillingham project. The project entailed removing four inches of the existing runway surface and repaving it. On June 21, 2017, bidding opened, and three contractors submitted their bids.[32] On June 27, 2017, DOT issued an Intent to Award the contract to the lowest bidder, QAP, and formalized the award on July 13, 2017. QAP's total bid for the project was $7,996,317.70, approximately $2.6 million below DOT's Engineer Estimate.[33]

By October 2018, the project was nearing completion and DOT had paid QAP approximately 90% ($7.4 million) of the total contract price.[34] At this point, it was customary for the project engineer to calculate the price adjustments outlined in P-401.[35] The project engineer prepared and emailed a proposed final pay estimate ("pay estimate #10") to QAP that incorporated the price adjustments.[36] Shortly after emailing proposed pay estimate #10, DOT and Weed Engineering discovered that a figure included in line-

---

[30] *Id.* at 361-362; *see also* footnote 5.

[31] *Id.* at 362 (Ms. Paul testified that she believed the review was likely before the error was discovered. She also testified that it is her assumption the formulaic error was missed because Central Region does not do as many airport projects as it does highway projects, and as such, the information was not relayed to the aviation side).

[32] R. at 210-2014.

[33] R. at 205-2014.

[34] R. at 989.

[35] Paul Test. at 334-336. The project engineer was Larry Geise at Weed Engineering.

[36] R. at 134-138. Although, the pay estimate was signed by the project engineer or his authorized agent, the actual pay estimate was prepared by the team at Weed Engineering which acted as the "contract administrator." Additionally, the following day Cari Tavenier emailed Kyle Green again with attached specifications and test results. Unfortunately, the body of this email contains numerous errors. Among them: the numbers for the HMA and ACP adjustments were flipped; the correct final tonnage for asphalt oil was not used in the calculation, and the total number, $863,500, appears to be the sum of only the HMA and the incorrect ACP adjustments. *See* R. at 139-151; *see also* R. at 1007-1008.

item P-401b was incorrect because of an error in the formula used to calculate the ACP price adjustment. [37]

On November 29, 2018, DOT and Weed Engineering met to discuss the error.[38] On December 6, 2018, DOT's project manager corresponded with the FAA regarding the error and attached a proposed change order to correct it.[39] DOT alleges it provided QAP with a proposed change order to correct the mistake. QAP alleges that it never received a proposed or final change order. For reasons unknown, the proposed change order that was previously sent to the FAA was never finalized. On December 9, 2018, Weed Engineering emailed DOT asking for direction on P-401b.[40] Ultimately, as stated in the December 6th email from the DOT project manager to the FAA, DOT concluded the ACP price adjustment figure was incorrect and a revised pay estimate would be generated. On December 28, 2018, Weed Engineering emailed QAP the revised pay estimate ("pay estimate #11").[41]

QAP submitted three claims to DOT.[42] Two of the claims stemmed from the greater than expected amount of oil required to perform the contract, and the third related to the ACP price adjustment. On July 31, 2019, the DOT Contracting Officer denied all three claims for lack of merit. Following administrative procedures, QAP appealed the decision to the Commissioner of DOT. The Commissioner referred the matter to the Office of

---

[37] R. at 161. Line-item P-401b is titled Hot Mix Asphalt Price Adjustment, which is confusing given that one of the three included adjustments has a similar title, R. at 1006. It is additionally confusingly titled since the specification involved is P-401. Therefore, for purposes of this decision, it will only be referred to as line-item P-401b.

[38] R. at 159-160.

[39] The email was the project manager's negotiation with the FAA regarding the change order because it was a federally funded project. The project manager explained in the change order what the error was and acknowledged that the error in the formula generated a large bonus but that the contract provision intended a pay reduction only. R. at 348-349.

[40] *Id.*

[41] R. at 155-158. Additionally, pay estimate #11 is mistakenly labeled pay estimate #10.

[42] QAP submitted the first two claims on November 6, 2018. The third claim was submitted on May 3, 2019. The contracting officer notes in his decision that the three claims could be deemed untimely, but DOT agreed to accept and evaluate them regardless, R. at 501.

Administrative Hearings to conduct an evidentiary hearing.[43] On March 29, 2021, the ALJ affirmed the Contracting Officer's denial of the three claims. However, the ALJ denied the third claim without prejudice as to the HMA price adjustment.[44] On July 6, 2021, the Commissioner adopted the decision in its entirety as DOT's final decision. QAP timely appealed to this court.

III. ISSUE PRESENTED

The court addresses whether the ACP price adjustment calculated under Subsection 401-8.2.a. should be interpreted as a penalty or a bonus.

IV. STANDARD OF REVIEW

The superior court has jurisdiction to act as an intermediate appellate court and review appeals from administrative agencies pursuant to Alaska Statute 22.10.020(d) and Appellate Rule 601 *et seq*. When the superior court acts as an intermediate appellate court

---

[43] The evidentiary hearing was held on August 24-26, 2020.

[44] In footnote 36 above, the issue of the total sum indicated on line-item P-401b of pay estimate #10 is addressed. Again, the sum of line-item P-401b should be the total of the numbers calculated under P-401's Subsections 401-8.1.a. (HMA price adjustment), 401-8.2.a. (ACP price adjustment), and 401-8.3.a. (Longitudinal Joint price adjustment). For unknown reasons, when pay estimate #10 was issued, line-item P-401b stated the sum of those adjustments was $863,500. Likewise, that is the number that QAP claims it is owed. However, the numbers used to prepare pay estimate #10 were: $93,500 (HMA price adjustment), $770,000 (ACP price adjustment), and $40,600 (Longitudinal Joint price adjustment). The total of these three numbers is $904,100. It is inferred that the $863,500 is the sum of the HMA and ACP price adjustments. Therefore, pay estimate #10 was incorrect for a multitude of reasons: 1) It did not include the sum of all three adjustments. 2) It remains a mystery as to how $770,00 was calculated for the ACP price adjustment. When using the formula as written, the total would have been $864,270. Accordingly, if the formula as written were to remain effective, technically line-item P-401b should be $998,370. However, QAP never argues that point and maintains it is owed the erroneous sum of $863,500. 3) The ACP price adjustment should have been $0 if the formula was written to include the "-1." To add further confusion, when pay estimate #11 was sent to QAP, line-item P-401b indicated $40,600 was estimated and $195,573.78 was paid to date. The ALJ decision questioned all of these discrepancies in depth. No satisfactory answer emerged as to why the HMA value was removed, whether the $40,600 for the Longitudinal Joints price adjustment had been paid, and what the origin of the $195,573.78 paid to date was. The ALJ concluded that the $40,600 for Longitudinal Joints had been paid. The ALJ rejected the entirety of the claim for $863,500 but without prejudice to the $93,500 for the HMA price adjustment if QAP establishes entitlement and the funds are still owed.

for an administrative appeal, it reviews: "(1) whether the agency has proceeded without, or in excess of jurisdiction, (2) whether there was a fair hearing and (3) whether there was a prejudicial abuse of discretion."[45] "Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."[46]

The Alaska Supreme Court identifies four distinct methods of review of administrative decisions: the "substantial evidence test" for questions of fact; the "reasonable basis test" for questions of law involving agency expertise; the "substitution of judgment test" for questions of law where no agency expertise is involved; and the "reasonable and not arbitrary test" for review of administrative regulations.[47]

The question before the court is how the parties' contract requires the ACP price adjustment to be interpreted. The Alaska Supreme Court has held that "[i]nterpretation of a contract is a question of law that is not within the department's special expertise or skill."[48] Therefore, the "substitution of judgment" test provides the applicable standard of review.[49]

V. DISCUSSION

QAP interprets the ACP price adjustment reflected on line-item P-401b in pay estimate #10 as a bonus. QAP contends its position is reasonably supported by the project engineer's interpretation and the surrounding contract language. Further, QAP asserts that

---

[45] Alaska Statute 44.62.570(b).

[46] *Id.*

[47] *State, Dep't of Nat. Res. v. Alaskan Crude Corp.*, 441 P.3d 393, 398 (Alaska 2018) (quoting *Alaskan Crude Corp. v. State, Dep't of Nat. Res., Div. of Oil & Gas*, 261 P.3d 412, 419 (Alaska 2011), *Pasternak v. State, Commercial Fisheries Entry Comm'n*, 166 P.3d 904, 907 (Alaska 2007)); *Jager v. State*, 537 P.2d 1100, 1107 (Alaska 1975).

[48] *State*, 441 P.3d at 398 (quoting *Exxon Corp. v. State*, 40 P.3d 786, 792 (Alaska 2001)).

[49] *City of Valdez v. State*, 372 P.3d 240, 246 (Alaska 2016) ("Under this standard, we exercise our independent judgment, substituting it 'for that of the agency even if the agency's [interpretation] ha[s] a reasonable basis in law.'").

even if the price adjustment formula is declared erroneous, it is a unilateral mistake on the part of DOT and the contract cannot be reformed in favor of the drafter.

DOT maintains that at the time of this contract, the ACP price adjustment was intended to provide only penalties when asphalt oil was sub-par but still acceptable. DOT states that the ACP price adjustment subsection contained an incorrect formula which contradicted the surrounding contract language. DOT agrees that QAP provided asphalt oil that met specifications but maintains there should be no bonus, rather a penalty of $0. Therefore, DOT requests that the court affirm the ALJ decision. Conversely, QAP requests that the court reverse and remand the ALJ decision, with instructions for DOT to pay, with costs and interest, the entire adjustment calculated by the project engineer, $863,500.

The three primary factors determining whether the adjustment should be treated as a bonus or penalty are 1) whether the project engineer had the authority to interpret the legal meaning of the contract, 2) whether the ACP price adjustment subsection and formula were ambiguous, and 3) whether the formula supported a bonus or a penalty.

A. The project engineer did not have the authority to interpret the legal meaning of the contract specification.

Section 50-1 of the contract specifications outlines the responsibilities and authority of the project engineer. In particular, it signals that the project engineer "has immediate charge of the engineering details of the project and is responsible for contract administration."[50] Additionally, it states that the project engineer "will decide all questions about... contract interpretation and all other questions relating to contract performance."[51]

QAP argues that the project engineer's calculations in pay estimate #10 are not only correct but binding on DOT pursuant to the authority given to the engineer under Section 50-1. QAP contends that a pay estimate in itself is not necessarily binding but argues the project engineer's reasonable interpretation of the specifications is binding. Further, QAP

[50] R. at 857.

[51] *Id.*

reasons that because the project engineer signed off on pay estimate #10, the figures contained within it should be upheld as a bonus.

DOT acknowledges that Section 50-1 does grant the project engineer authority regarding payments, but argues the authority is limited to making recommendations. DOT argues the project engineer here calculated a number using the contract's formula, which DOT later discovered to be erroneous. DOT asserts it should not be estopped from correcting the error and refusing an unjustified bonus to QAP simply because the project engineer consummated the calculation.

In the view of the court, the delineation of the scope of the project engineer's role in interpreting the contract must take into account the engineer's expertise and the engineer's role in the contract's payment process. With this in mind, the court concludes that the project engineer's authority concerning "contract administration" generally refers to judgments concerning whether the contract's performance requirements have been met, and not what consideration is due under the contract. Here, there is no evidence that the project engineer played any role in negotiating the contract and—more importantly—the project engineer has no unique expertise with respect to pricing and other policy considerations that affected DOT's decision to enter into the contract. Thus, there is no reason to defer to the project engineer's interpretation of pricing terms created by DOT.

The project engineer's role in the payment process reinforces this conclusion. When a pay estimate is generated, it is first signed by the project engineer, then sent to the contractor for review and signature. It is then submitted to DOT's regional office engineer for review and signature, and finally to DOT's project manager's supervisor—the construction group chief—who will give the final signature before any payment can be issued.[52] Thus, the project engineer's approval is merely a preliminary step in the contract's payment process, and not the deciding step. Here, pay estimate #10 was signed by an authorized agent of the project engineer, Larry Geise, at Weed Engineering. It was then

[52] Admin. Hr'g Tr. of Record, Ronald Searcy Test. on Day 2 at 434-435.

sent to the contractor, QAP, for review and signature. However, within a matter of days and prior to QAP signing it, the error was noticed. DOT never approved the pay estimate. Instead, DOT immediately put pay estimate #10 on hold, notified QAP, and began conducting a series of meetings to address the issue.[53] Given the well-established process for pay estimates, including the hierarchy of reviews and need for final approval by DOT, the court concludes the project engineer's interpretation of the specification cannot be binding.[54]

The disputed figure contained in pay estimate #10 presents a question of the parties' contractual intent, not engineering. The resolution of the meaning of the specification falls within the purview of the court and not the project engineer.

B. <u>The ACP price adjustment, Subsection 401-8.2.a., unambiguously provides for a downward price adjustment only.</u>

In general, the parties agree that the ACP price adjustment subsection is unambiguous, but they dispute its meaning and application. QAP contends that it unambiguously provides a bonus for asphalt oil that optimally meets the contract specifications. QAP appears to reach this conclusion by asserting that the language of Subsection 401-8.2.a.—"[t]he total asphalt cement price adjustment...will be deducted under Item P-401b"—is only an artifact of the prior Table 9 now replaced by Table 10. QAP argues that the language of Subsection 401-8.2.a. is in conflict with the new formula, which QAP views as a special provision that provides a substantial bonus, and thus the

[53] During this time, the chain of text messages between Cari Tavernier, employee of Weed Engineering, and Kyle Green, employee of QAP, indicate not only that QAP was confused as to the P-401 adjustments included in line-item P-401b, but that the project engineer of Weed Engineering was under the direction of DOT's project manager, *see* R. at 152-154, 161-167.

[54] The reliance of the project engineer on the hierarchy of approval for payments, pay estimates, and contract interpretation is evidenced by the December 6, 2018, email from Weed Engineering to the project manager and other DOT representatives. In this email Weed Engineering asks DOT for direction on P-401b and explains that it will make the changes that *DOT* advises them to make or, *if DOT approves* the pay estimate as written, it will forward it to the contractor, *see* R. 158-160.

language is superseded.[55] QAP maintains the intent to allow for a bonus is supported by the fact that the formula results in a positive number and by the removal of the language "pay reduction factors" and "always deduct" from the prior table and formula.[56] Lastly, QAP concedes that although it believes the specification unambiguously provides for a bonus, the "artifact" language could make the specification ambiguous, in which case QAP proclaims the court must resolve the ambiguity in favor of QAP.[57]

In contrast, DOT argues that while the formula is incorrect there is no inconsistency between the formula and the rest of the ACP price adjustment subsection; they unambiguously provide for a deduction in price to the contractor regardless of whether the formula generates a positive result. DOT presented evidence that during the time of this contract DOT only allowed a contractor in an airport construction project to be penalized when asphalt oil failed to meet the contract specifications and, rather than awarding a bonus, it simply imposed no penalty if the asphalt oil optimally met specifications. Furthermore, DOT argues that even if the court finds the subsection to be ambiguous, the large bonus QAP seeks here would still not be justified because there is no evidence that QAP had any reasonable expectation of receiving a bonus or relied on such a prospect.

The primary problem with QAP's argument is textual, specifically the absence of any language in the ACP price adjustment subsection that suggests payment of a bonus or indicates that more than the contract price will be paid. Nor is there any language referring to deductions in a manner suggesting the references are simply orphaned artifacts leftover from recent revisions to the specification. Instead, the terms "deduct" and "reduction" are consistently used. The preamble of Section 401-8.2 directs the engineer to "adjust Contract

---

[55] R. at 868 (Section 50-04 provides the order of precedence when the language is conflicting is to be as follows: special provisions, plans, standard specifications, material's testing standard, and FAA advisory circulars).

[56] See figures 1 and 2 above.

[57] *See* Br. of Appellant at 21 (citing *Alaska State Hous. Auth. v. Walsh & Co.*, 625 P.2d 831, 838 (Alaska 1980) and doctrine of contra proferentem).

Item P-401b for asphalt cement property according to Subsection 401-8.2.a." Subsection 401-8.2(a), as quoted above, refers only to a deduction in price. While the term "adjust" could mean either an upward or downward change in price, here the surrounding language constrains the engineer to follow Subsection 401-8.2.a. and apply a deduction. Additionally, Subsection 401-8.2.a. provides that "[a]sphalt cement pay *reduction* factors for each lot will be determined from Table 10" and that in calculating the adjustment the lowest pay *reduction* factor should be used. (Emphasis added.) The language of the ACP price adjustment subsection thus expressly indicates that any "adjustment" for the ACP must be a deduction.[58]

A comparison between the ACP price adjustment subsection and the two related price adjustment subsections reinforces DOT's position. Subsection 401-8.2.a. controls the adjustment of the price based on the properties of the asphalt oil. Subsections 401-8.1.a. and 401-8.3.a., respectively, govern price adjustments based on the asphalt oil content and the joint density. Subsection 401-8.1.a. provides that "[t]he total hot mix asphalt price adjustment is the sum of the individual lot price adjustments, and will be *added* or *deducted* under Item P-401b, Hot Mix Asphalt Price Adjustment." (Emphasis added.) Similarly, Subsection 401-8.3.a. explicitly allows for either a deduction in price or an increase in price, i.e., an incentive, depending on testing. The ACP price adjustment subsection, however, makes no mention of price additions or incentives.

Taken as a whole the language of the contract clearly and unambiguously indicates that if any price adjustment for the quality of the asphalt oil is warranted, it must be downward; the language makes no provision whatsoever for paying an incentive or bonus.[59]

---

[58] Although in the case of optimal material the deduction would be zero.

[59] Alaska law provides that contract ambiguity is determined based on the reasonable expectations of the contracting parties. *See Tesoro Alaska Co. v. Union Oil Co. of California*, 305 P.3d 329, 333 (Alaska 2013) (holding that "[w]hen resolving disputes concerning the meaning of an agreement, we begin by viewing the contract as a whole and the extrinsic evidence surrounding the disputed terms, in order to determine if those terms are ambiguous—that is, if they are

Contrary to QAP's argument, the mere fact that the number calculated under line-item P-401b is positive does not imply that the ACP price adjustment is a bonus. Line-item P-401b corresponds to calculations performed in Subsections 401-8.1.a., 401-8.2.a., and 401-8.3.a. of the specifications. As noted by the ALJ, line-item P-401b represents the net result of combining the ACP price adjustment with the HMA and Longitudinal Joint Price adjustments.[60] As a result, the ACP price adjustment could be a penalty and yet line-item P-401b could still be a positive sum because the other two components, the HMA price adjustment and the Longitudinal Joint price adjustment, allow for upward price adjustments.

QAP places great emphasis on differences between Table 10 and the table it replaced, Table 9. The differences, however, are accounted for by the uncontradicted testimony that DOT was transitioning toward a new specification that eventually would permit incentive payments for superior asphalt oil. For example, under Table 9 the price adjustment calculation began with the direction to select the "highest pay reduction factor" (PRF). This was because the PRF's ranged from 0 to 25%, with the lowest pay factor— 0 —representing full payment, and the highest pay factor— 0.25 — representing the greatest penalty apart from rejecting the entire material. However, under Table 10 the order of the PRFs were flipped to allow for future incentive options and thus the lowest pay factor would now provide the greatest penalty for sub-par quality. The PRFs on Table 10 indicate the percentage that will be paid ranging from 100% to 85%, with the highest pay factor— 1.00 —representing full payment, 0.95 representing 95% payment, etc. QAP fails to acknowledge that none of the pay factors in Table 10 provide more than the contact price (1.00).

---

reasonably subject to differing interpretations. Where an ambiguity exists, we resolve the ambiguity by determining the reasonable expectations of the contracting parties in light of the language of any disputed provisions, other provisions, relevant extrinsic evidence, and case law interpreting similar provisions." (citations omitted)).

[60] R. at 1014.

Instead, QAP stresses that the language "pay reduction factors" and "always deduct" were stricken from Table 9 and formula and not included in the new table and formula. These changes do not create ambiguity, however, as the remaining language overwhelmingly and consistently provides only for potential reductions in price. The court does not disagree with QAP that Table 10 is a special provision and that special provisions supersede standard specifications when in conflict. However, the court finds that Table 10 does not conflict with any of the standard provisions here.

Finally, it is clear that at the time of this contract, the specifications were undergoing significant changes and airport construction projects had not begun allowing an upward ACP price adjustment. In conjunction with the project bid schedule indicating line-item P-401b to be paid as a contingent sum, it is clear QAP had no expectation of a bonus for the ACP price adjustment in this project. The court is not persuaded by QAP's comparisons to the highway projects that paid bonuses for a similar formula as proof of its expectation and reliance in this project. The record shows that those projects were substantially different. For example, the highway projects paid the bonuses for the ACP price adjustment because the surrounding language was ambiguous. Highway projects already allowed upward or downward ACP price adjustments, which the surrounding contract language reflected.

The court concludes that the language of the ACP price adjustment subsection makes no allowance for anything but a reduction when acceptable but sub-par asphalt oil is provided. The language of the subsection indicates that it provides a downward price adjustment mechanism based on the quality of the asphalt oil and does not provide bonuses or incentives for asphalt oil that meets or exceeds the properties specified for the project.

C. The formula is erroneous but the error does not support a bonus.

The ALJ decision held that the ACP price adjustment formula was in error and constituted a unilateral mistake on behalf of DOT because it failed to include "-1" as intended.[61]

---

[61] R. at 1010. The ALJ's decision mistakenly described the error in the formula. The ALJ states that the equation should have included "(Lowest Pay Factor -1)" if it was to be added and "(1-

DOT acknowledges the error in the formula and explains that in order for the formula to operate correctly and as intended with the provision, the formula should have been:

(Lowest Pay Factor – 1) x Quantity x PAB x 5

DOT asserts that the formula error is a unilateral mistake that unintentionally *penalizes* QAP for asphalt oil that met the contract specifications. DOT urges the court not to apply the erroneous formula to the provision literally since that would trigger an unjustified and unintended penalty to QAP. Instead, DOT asks the court not to enforce the provision and formula. QAP insists that even if the formula is found to be erroneous and considered a unilateral mistake, the contract cannot be reformed or voided in favor of the drafter, DOT.[62]

The formula as written and when read in the context of Subsection 401-8.2.a., operated to impose a significant penalty on the contractor for on-par asphalt oil. The court agrees with DOT that it erred by omitting "-1" from the calculation, which represents a unilateral mistake. Had the formula been written correctly and as intended, the asphalt oil testing results, which showed on-par material, warranted a penalty of $0. Therefore, the court finds that the formula should not be enforced as drafted by DOT. Contrary to QAP's position, non-enforcement of the formula does not constitute contract reformation.

VI. CONCLUSION

The court concludes that the project engineer does not have the authority to interpret the contract specifications, the ACP price adjustment subsection is not ambiguous, and the only issue present is DOT's unilateral mistake in the form of the erroneous formula

---

Lowest Pay Factor)" if it was to be subtracted. This is incorrect for airport construction contracts. The correct expression of the calculation is: *(Lowest Pay Factor – 1) x QTY x PAB x 5*. This format would allow the formula to properly calculate either deductions or, when DOT modifies the ACP price adjustment, incentives. For example, using a hypothetical number for the quantity, a 1% bonus could be provided to a contractor as follows: *(1.01 - 1) x 1,000 x 110 x 5 = $5,500.* Using the same hypothetical quantity, the formula would work to provide a 10% deduction to a contractor as follows: *(0.90 - 1) x 1,000 x 110 x 5 = -$55,000.*

[62] Br. of Appellant at 22 (citing the Restatement (second) of Contracts and *Handle Const. Co. v. Norcon, Inc.*, 264 P.3d 367 (Alaska 2011)).

contained within the ACP price adjustment subsection. While the erroneous formula constitutes a unilateral mistake, reformation, or voidance of the contract by the court is unnecessary. There is no evidence that QAP relied on DOT's misstatement of the formula or that it was even aware of the error during the pre-construction meetings or anytime thereafter until notified by DOT. Moreover, the error was corrected properly when DOT put a hold on pay estimate #10 and issued a revised estimate. The court further concludes that under the contract the ACP price adjustment included on line-item P-401b was supposed to be $0. The court rejects QAP's entire claim of $863,500, subject and without prejudice to the HMA adjustment of Subsection 401-8.01.a.[63]

ORDERED this 23rd day of March 2023, at Anchorage, Alaska.

[redacted]
ANDREW GUIDI
Superior Court Judge

I certify that on 3/23/2023
a copy of the above was emailed to
each of the following at their
addresses of record:

Michael C. Geraghty
mcgeraghty@hollandhart.com
Counsel for Appellant

William G. Cason
wgcason@hollandhart.com
Counsel for Appellant

Max D. Garner
max.garner@alaska.gov
Counsel for Appellee

[redacted]
Janice Rowell, Judicial Assistant

[63] See footnote 44.